IN THE SUPREME COURT OF NEW ZEALAND

SC 31/2014
[2014] NZSC 76

BETWEEN	ALAVINE FELIUAI LIU Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Court:	Elias CJ, William Young and Glazebrook JJ
Counsel:	A G James for the Applicant U R Jagose and L M Inverarity for the Respondent
Judgment:	20 June 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs of $2,500.

REASONS

Introduction

[1] Mr Liu is a Samoan citizen. He had been unlawfully in New Zealand since his work permit expired on 18 June 2011. On 4 January 2012 he was served with a deportation order.

[2] An immigration officer considered cancelling the deportation order under s 177 of the Immigration Act 2009. That provision, under s 177(1), confers an absolute discretion on the immigration officer as to whether or not to cancel the order but provides, under s 177(2), that the officer must consider cancelling the

deportation order of a person who is in New Zealand if the person provides information that is relevant to New Zealand's international obligations.

[3] There was information before the immigration officer that deportation would adversely affect the interests of Mr Liu's immediate family: his partner and two children. One of the children is Mr Liu's biological son. All three members of his family are New Zealand citizens and the immigration officer was told that they would not accompany Mr Liu to Samoa if he were deported. Indeed, at the time of the deportation decision, Mr Liu was separated from his partner, although she said she would have him back if he dealt with his alcohol abuse issues.

[4] The immigration officer considered art 3.1 of the United Nations Convention on the Rights of the Child (Children's Convention), which provides that in all actions involving children their best interests shall be "a primary consideration". He also said that he took into consideration the protection order taken out by Mr Liu's partner and the history of domestic violence, as well as a raft of other international instruments

[5] The immigration officer decided not to cancel the deportation order and on 18 April 2012 Mr Liu was deported on leaving prison, where he had been serving a sentence for offences of violence against his partner. This was not his first conviction for assaulting his partner.

Judicial review proceedings

[6] Mr Liu applied for judicial review of the s 177 decision. Whata J held that arts 9 and 10 of the Children's Convention should have been considered by the immigration officer and ordered that an immigration officer reconsider the deportation decision.[1] His decision was overturned by the Court of Appeal[2] and Mr Liu seeks leave to appeal against that decision.

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1 *Liu v Chief Executive of Department of Labour* [2012] NZHC 2753, [2012] NZAR 1012

2 *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* [2014] NZCA 37, [2014] 2 NZLR 662.

Grounds of application

[7] The primary ground is that the Court of Appeal was wrong in holding that art 9 and in particular art 9.1 of the Children's Convention is not relevant to deportation cases.[3]

[8] The immigration officer did not (at least expressly) consider art 9.1, which provides that a child shall not be separated from his or her parents against their will except where competent authorities, subject to judicial review, decide that separation is in the child's best interests. It goes on to say that separation may be necessary in a particular case where there is abuse or neglect of the child by the parents or where the parents are living separately and a decision must be made as to the child's place of residence.

[9] The secondary ground of appeal is that the Court of Appeal erred in its consideration of the caselaw.

Our assessment

[10] This Court, in *Ye v Minister of Immigration* rejected the submission that a child's best interests in any immigration decision must be the paramount (rather than primary) consideration when deciding whether or not to cancel a removal order.[4] On a literal reading of art 9.1, that article, if applicable would set what is arguably a higher standard than that rejected by this Court in *Ye*.[5] It would require the deportation of a parent to be positively in a child's best interests.

[11] The applicant in this case appears to accept that art 9.1 does not create paramountcy for the best interests of the child and that it does not elevate the best interests of a child beyond that of a primary consideration. Even if that

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3 Mr Liu does not now contend that art 10 is relevant.

4 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104: see the judgment of Tipping J (on behalf of himself, Blanchard, McGrath and Anderson JJ) at [24]. Elias CJ, at [1], agreed with the majority's conclusion on that point but dissented with respect to the interpretation and scope of s 47(3) of the Immigration Act 1987.

5 The *Ye* decision related to different statutory provisions (s 58 of the Immigration Act 1987) but was concerned with the relevance of the Children's Convention to decisions relating to the removal of parents from New Zealand and therefore is still applicable on this point, despite the different statutory context.

interpretation accords with the wording of art 9.1 (which we doubt), it is difficult to see how a consideration of art 9.1 (as interpreted by Mr Liu) would add anything to art 3.1 of the Children's Convention, which provides that the best interests of the child are a primary consideration.

[12] As to the secondary ground that the Court of Appeal erred in its consideration of the caselaw, it is not suggested that the Court misinterpreted the main decisions it relied on and which were supportive of its decision.[6]

[13] Any point of public importance has been settled by this Court's decision in *Ye*. Further, as there is no suggestion in this case that art 3.1 was not taken into consideration in a proper manner by the immigration officer, there is no risk of a miscarriage of justice.

Result

[14] The application for leave to appeal is dismissed.

[15] The applicant is to pay the respondent costs of $2,500.

Solicitors:
Davidson & Associates, Christchurch for the Applicant
Crown Law Office, Wellington for the Respondent

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6 See *Naidike v Attorney General of Trinidad and Tobago* [2004] UKPC 49, [2005] 1 AC 538 at [74] in the separate judgment of Baroness Hale cited by the Court of Appeal in this case at [21], and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 in the passage cited by the Court of Appeal in this case at [21].